IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA614/2021
[2022] NZCA 564

BETWEEN	SPAK (1996) LIMITED Appellant
AND	REECE LEROY First Respondent
	BODY CORPORATE 407404 Second Respondent

Hearing:	19 July 2022
Court:	Courtney, Thomas and Peters JJ
Counsel:	D M Salmon KC, M Eastwick-Field and S J Shanks for Appellant E J H Morrison and C J H Fraser for Respondent
Judgment:	18 November 2022 at 10.15 am

JUDGMENT OF THE COURT

A The appellant's application to adduce further evidence is declined.

B The first respondent's application to adduce further evidence is granted.

C The appeal against summary judgment is dismissed.

D The appeal against the award of indemnity costs is allowed.

E Costs on the appeal to this Court are reserved.

F Costs in the High Court are remitted back for determination in that Court.

REASONS OF THE COURT

(Given by Thomas J)

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Introduction

[1] In September 2020, SPAK (1996) Limited (SPAK), the operator of an Auckland hotel intended for use as a managed isolation facility in response to the COVID-19 pandemic, commenced proceedings in trespass against Reece LeRoy, the building manager of apartments located within the same building as the hotel. In October 2020, SPAK obtained an interim injunction against Mr LeRoy restricting his entry into the hotel. Almost a year later, by which time Mr LeRoy had ceased working as the building manager, the High Court gave summary judgment dismissing SPAK's trespass claim, finding SPAK had no arguable case against Mr LeRoy and that it had an improper purpose in bringing the proceeding.[1] Indemnity costs were awarded. SPAK now appeals.

Background

[2] The background to these proceedings is largely uncontentious and evidenced by the documents exhibited to the various affidavits filed in the proceedings.

The building

[3] SPAK operates the Stamford Plaza Hotel at 22–26 Albert Street, Auckland (the Hotel). The residential apartments (the Apartments) are privately owned as unit titles and are located in the same building, above the Hotel.

[4] From 2014 until March 2021, Mr LeRoy was engaged by the Body Corporate of the Apartments as building manager.[2] In this role he carried out general building

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1 *SPAK (1996) Ltd v LeRoy* [2021] NZHC 2398 [Judgment on appeal].
2 A passing issue was Mr LeRoy's status as the building manager and whether the Body Corporate

management tasks, including cleaning and maintenance, maintaining fire safety systems, reporting hazards and taking remedial action, security control of the Apartments, and informing the Body Corporate of matters relating to the Hotel and facilities shared with the Hotel.

[5] Some areas of the building are used by both the Hotel and the Apartments and their use is governed by registered easements. The shared areas on Levels 3 and 4 of the building, which provide access between the Apartments and lifts leading to the carpark, are the locations of the alleged trespasses. Mr LeRoy's office as building manager was situated on Level 3.

[6] The easement relevant to these proceedings grants pedestrian rights of way over the Hotel corridors on Levels 3 and 4 (the Easement). The grantee of the Easement includes the Body Corporate, its agents, employees, contractors, tenants, licensees and invitees, as well as its building manager.

[7] The rights granted pursuant to the Easement include:

(a) a full, free and uninterrupted right to go over and along the Easement Area;

(b) a right to go over the Easement Area with personal and household items; and

(c) a right to have the Easement Area kept clear at all times of obstructions to the use and enjoyment of the Easement Area.

[8] The Easement includes a disputes clause whereby the party initiating the dispute process must give written notice of the dispute to the other and the parties must try to resolve the dispute through good faith negotiations. If the dispute is not resolved, then it is either referred to senior representatives of the grantor and grantee, who are

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had a valid contract with him or his company which is no longer on the Companies Register. It was not in dispute, however, that he was associated with the Body Corporate and the chair of the Body Corporate and residents of the Apartments were in frequent contact with him asking him to do things typically the responsibility of a building manager. It was accepted that he was treated as the building manager.

to negotiate in good faith, or to mediation. Failing that, the dispute is referred to an arbitrator.

[9] SPAK complained of three incidents (and commenced proceedings in respect of two of them), all of which took place on the Easement Area and on the part of it designated by SPAK for use by the Body Corporate and its agents.

COVID-19

[10] In response to the developing worldwide spread of COVID-19, on 23 March 2020 New Zealand moved to what was called Alert Level 4, requiring, with limited exceptions, a lockdown of people and businesses. On 13 May 2020, New Zealand moved to Alert Level 2, lifting the lockdown but still requiring certain restrictions, particularly in relation to international travel both into and out of the country.

[11] In June 2020, SPAK entered into negotiations with the Ministry of Health with the objective of the Hotel being operated as a managed isolation facility (MIF). MIFs were facilities, often hotels, where arrivals into New Zealand (and later members of the community who tested positive for or were exposed to COVID-19) were required to isolate for a minimum of 14 days in order to allow for the detection of the virus and to prevent transmission in the community. It is unclear when the residents of the Apartments/Body Corporate became aware of this proposal but the Chief Ombudsman later found they were inadequately consulted about it.[3]

The Hoardings Incident

[12] On 19–20 June 2020, SPAK erected moveable barriers along the length of the Easement Area creating separate lanes — one lane for the residents of the Apartments and the other for those using the Hotel. The parties referred to these barriers as "hoardings".

[13] On 20 June 2020, Benedict Tan, the in-house lawyer for SPAK's parent company, wrote to Mr LeRoy claiming he had committed a "wrongful interference"

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3 Peter Boshier *Consultation on health and safety processes for Managed Isolation Facility* (Office of the Ombudsman, Case Note, 13 October 2020).

by allegedly spreading false and misleading information relating to the Hotel becoming a MIF.

[14] On 20 and 21 June 2020, a resident raised a concern with the Body Corporate Chairperson, Adrian Yap, and Mr LeRoy that the position of the hoardings did not leave sufficient space for their wheelchair-bound son to pass along the Easement Area. On 21 June, Mr LeRoy notified SPAK of this issue and moved the hoardings on Level 4. He did this from what SPAK had designated as the residents' side of the Easement Area.

[15] While not pleaded as a cause of action, this is the first incident referred to in the statement of claim.

[16] On 21 June 2020, SPAK wrote to Mr LeRoy again, repeating the allegation about "wrongful interference" and notifying him he was not to enter into "the Hotel premises" and to do so would be a trespass (the trespass notice). The letter did not refer to the movement of the hoardings but did refer to an alleged historical incident to suggest Mr LeRoy was "recalcitrant".

[17] On 24 June 2020, a lawyer engaged by Mr LeRoy wrote to Mr Tan. The letter referred to the need for Mr LeRoy to access the Easement Area as building manager and proposed a meeting to resolve matters.

[18] On 25 June 2020, SPAK's former external counsel replied, declining to withdraw the trespass notice or attend a meeting.

First alleged trespass — 4 July 2020 (the Door Knocking Incident)

[19] On 2 July 2020, the Hotel began operating as a MIF.

[20] On 4 July 2020, Mr LeRoy knocked on the door of a Level 3 Hotel room on the residents' side of the hoardings. He recorded this incident on his cellphone.

Second alleged trespass — 22 July 2020 (the Letter Drop Incident)

[21] On 13 July 2020, SPAK distributed letters addressed to "The Owners" of the Apartments, making allegations about Mr LeRoy and inviting the residents to participate in a class action against Mr LeRoy in relation to a 2016 incident when he had switched off a chiller unit belonging to the Hotel (the Chiller Incident). SPAK had received around $20,000 from the Body Corporate in settlement of any claim in this regard.

[22] On 21 July 2020, SPAK wrote again to "The Owners", repeating the allegations about Mr LeRoy and attaching the 13 July 2020 letter.

[23] On 22 July 2020, Mr LeRoy dropped some of the letters over the top of the hoardings dividing the Easement Area onto the Hotel's side.

SPAK commences proceedings

[24] On 12 August 2020, Auckland moved to Alert Level 3.[4]

[25] On 26 August 2020, SPAK's former counsel wrote to Mr LeRoy referring to the Letter Drop Incident and saying SPAK would commence trespass proceedings if an attached deed of undertaking were not signed. The undertaking required Mr LeRoy to not enter the "premises" of the Hotel (it made no reference to the Easement). It also indemnified SPAK against all claims or costs any person might have in connection with, or arising in any way from, a breach of the undertaking. Mr LeRoy did not respond.

[26] On 30 August 2020, Auckland moved to Alert Level 2.

[27] SPAK filed its claim for trespass on 4 September 2020. It applied to the High Court for an interim injunction on 23 September 2020. Mr LeRoy was served

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[4] Alert Level 3 imposed lesser restrictions than Alert Level 4. While not requiring a total lockdown, travel restrictions were in place, residents were required to work from home where possible and businesses could only operate under contactless conditions. Quarantine was still required for international arrivals.

on Friday 2 October 2020 and a hearing before Davison J took place the following Monday, 5 October 2020.

[28] Mr LeRoy did not attend the hearing. The interim injunction was granted.

[29] On 29 October 2020, Mr LeRoy asked SPAK for access to areas within the Hotel subject to the injunction, including the Easement Area. SPAK, through its former counsel, refused.

[30] On 26 November 2020, SPAK applied for judgment by way of formal proof against Mr LeRoy.

[31] On 4 December 2020, SPAK wrote to residents of the Apartments making allegations about Mr LeRoy and the support he received from the Body Corporate Committee. It referred to the interim injunction and indicated the Hotel would be willing to work with a new Body Corporate Committee.

[32] At the Body Corporate annual general meeting (AGM) on 9 December, a new Body Corporate Committee was elected. Mr LeRoy was told he could agree to resign or be terminated as building manager. Mr LeRoy resigned effective 31 March 2021.

[33] On 2 February 2021, Mr Abraham filed an affidavit in support of SPAK's application for judgment by way of formal proof. On 10 February, Mr LeRoy successfully applied for leave to file a statement of defence out of time.

[34] On 22 April 2021, SPAK applied for contempt and unless orders against Mr LeRoy.

[35] On 23 April 2021, Mr LeRoy filed his statement of defence and applied for summary judgment on his defence to SPAK's claim. Submissions in support of his application for summary judgment were filed on 2 August 2021 and included a submission that SPAK's claim should be struck out. Mr LeRoy filed a strike out application on 5 August 2021. SPAK's reply submissions in response to both the summary judgment and strike out applications were filed on 9 August 2021.

[36] Mr LeRoy filed a third party claim against the Body Corporate on the basis that he was employed as the Body Corporate's building manager and acting under the instructions, control and authority of the Body Corporate, including at the time of the alleged trespasses. He therefore claimed indemnity as an agent in respect of any liabilities he incurred as a result of the claim and, in the alternative, a contribution from the Body Corporate or an indemnity on the basis the Body Corporate was vicariously liable for his actions. The Body Corporate filed a statement of defence but took no part in the hearing of the applications for summary judgment and strike out. Similarly, the Body Corporate took no part in the appeal.

[37] The High Court hearing before Associate Judge Bell took place on 10 August 2021. The Judge declined to hear SPAK's contempt application on the basis he did not have jurisdiction to do so. By this time, SPAK no longer sought an unless order but did seek costs on its application which the Judge determined were better decided when the contempt application was heard.

[38] On 27 August 2021, the Judge communicated with counsel in relation to a draft of the judgment, directing they were not to provide it to their clients.

[39] The judgment under appeal was delivered on 14 September 2021.

The pleadings

Statement of claim

[40] By its statement of claim, SPAK outlined the background to the proceedings. It referred to the series of easements over the Hotel, noting it was generally possible for a person to access the Apartments without having to enter the Hotel except in respect of the lobby and lifts providing access to the Apartments from the carpark, meaning a person had to walk through a shared area on the third and fourth floors. It outlined the background to the Hotel becoming a MIF and the erection of the hoardings.

[41] In respect of the three incidents, the statement of claim pleaded as follows:

> *21 June 2020*
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> 22 On 21 June 2020, closed-caption television showed that Mr LeRoy:
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> 22.1 vandalised and damaged the rented hoardings on the fourth floor egress of the Hotel;
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> 22.2 tampered with locks connected to the hoardings; and
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> 22.3 attempted to break into the Hotel.
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> 23 Subsequently, also on 21 June, a notice of trespass (**Notice**) was issued to Mr LeRoy by Benedict Tan, Chief Legal Officer of Stamford Land Corporation Ltd. Among other things the Notice stated: "*we wish to also put you on notice that you are not to enter into the Hotel premises. It will be trespass if you are found within the premises of the Hotel, and appropriate action will be taken*".
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> 24 Mr LeRoy received the Notice and understood that if he were to enter Hotel premises he would be trespassing.
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> *4 July 2020*
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> 25 On 4 July 2020, Mr LeRoy disturbed an employee of SPAK while the employee was resting in his room at the Hotel.
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> 26 SPAK filed a report about Mr LeRoy with the New Zealand Police about this.
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> 27 Mr LeRoy had banged loudly on the employee's door, retreated when the door was opened, then banged loudly on the door again. When the employee opened the door for a second time Mr LeRoy behaved in a threatening manner towards him.
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> *22 July 2020*
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> 28 On 22 July 2020, closed-caption television showed Mr LeRoy:
>
> 28.1 had entered Hotel premises;
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> 28.2 depositing letters addressed to residents of the Stamford Residents over the hoarding on the fourth floor and into an area intended for sole access by those persons residing at the Hotel.

[42] The statement of claim referred to the Chiller Incident and alleged that, in January to March 2017, Mr LeRoy had acted aggressively towards Hotel staff members and/or third-party employees, causing them to feel their personal safety was at risk.

[43] The statement of claim referred to the undertaking SPAK had sought from Mr LeRoy but which he did not give.

[44] The sole cause of action was in trespass to land on the basis Mr LeRoy entered into Hotel land on 3 and 22 July 2020 without consent or justification and on 22 July 2020 caused a thing to enter Hotel land.[5] SPAK claimed Mr LeRoy's actions caused damage to SPAK.

[45] By way of relief, SPAK sought an injunction prohibiting Mr LeRoy from entering Hotel property, damages of an amount to be determined closer to trial, interest pursuant to the Interest on Money Claims Act 2016 and costs on an indemnity basis.

Statement of defence

[46] By his statement of defence, Mr LeRoy denied vandalising or damaging the hoardings, tampering with the locks or attempting to break into the Hotel. He provided his version of the three incidents, saying that he carried out his duties in accordance with his responsibilities to the Body Corporate and its rules and instructions, and in accordance with the relevant easements.

[47] Mr LeRoy said the purported trespass notice was wrongfully tendered and SPAK could not unilaterally restrict him from accessing areas shared between the Hotel and Apartments.

[48] Mr LeRoy pleaded three affirmative defences: authority to be on the land pursuant to the Easement; that the mandatory dispute resolution provisions of the Easement were a bar to proceedings; and that, if he were found to have trespassed, he had reasonable justification to do so as he was acting in the interests of others in his role as building manager.

Application for summary judgment

[49] Mr LeRoy's application for summary judgment relied on the same grounds. SPAK's opposition to it was on the basis the cause of action in trespass could succeed

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5 The Door Knocking Incident occurred on 4 July 2020. The 3 July date is assumed to be an error.

and it was reasonably arguable, citing Mr Abraham's affidavit evidence (addressed below) in support.

Application for strike out

[50] By his application for orders that the whole of the statement of claim should be struck out, Mr LeRoy claimed the proceedings were frivolous, vexatious and otherwise an abuse of the process of the court. The application also sought strike out of SPAK's application that Mr LeRoy be held in contempt of court on the same grounds.

SPAK's contempt application

[51] The contempt application was brought on the basis that Mr LeRoy was in the plant room on Level 24, which is a room in part of the building owned by the Body Corporate, and placed a covering over security cameras which had been installed by SPAK. This application was made after Mr LeRoy ceased being building manager. SPAK, through its former counsel, sought an order of imprisonment in respect of this alleged contempt.

The evidence

[52] The evidence before the Judge comprised three affidavits each on behalf of SPAK and Mr LeRoy.

[53] Mr Abraham, General Manager of the Hotel and a director of SPAK, provided an affidavit dated 17 September 2020 in support of SPAK's application for the interim injunction and a second one dated 2 February 2021 in support of SPAK's application for formal proof. His third affidavit was in support of SPAK's application that Mr LeRoy be held in contempt of court and that an unless order should be made against him. In its opposition to Mr LeRoy's application for summary judgment, SPAK relied on Mr Abraham's first and second affidavits.

[54] Mr LeRoy provided an affidavit dated 10 February 2021 in support of his application for leave to file a statement of defence out of time. He provided a second

affidavit dated 23 April 2021 in support of his application for summary judgment and a third affidavit dated 5 August 2021 in support of his strike out application.

[55] We summarise below the affidavit evidence as it relates to SPAK's claim against Mr LeRoy. More generally, we note that in his first and second affidavits, Mr LeRoy expressed his belief that the proceedings were designed to cause as much damage to him as possible and were brought to punish him for raising safety concerns regarding the Hotel becoming a MIF. Mr LeRoy heralded the strike out application in his affidavit in support of summary judgment, with his claim that SPAK's proceedings were frivolous and vexatious and brought for an improper purpose.

The Hoardings Incident — 21 June 2020

[56] Mr Abraham said Mr LeRoy vandalised and damaged the hoardings and tampered with their locks. This was shown by CCTV footage. The hoardings were installed to segregate Hotel guests from the residents of the Apartments because of the Hotel's appointment as a MIF. Mr Abraham said this could have resulted in the Hotel not being appointed as a MIF which would reduce Auckland's capacity for housing those who were isolating due to the COVID-19 situation.

[57] Mr Abraham said a trespass notice was then issued to Mr LeRoy and SPAK complained to the police through an online form.

[58] Mr Abraham said, as a result of Mr LeRoy's actions, it was necessary to monitor Mr LeRoy to prevent further interference with the Hotel. Costs to upgrade security systems totalled more than $40,000.

[59] Mr LeRoy outlined his role as building manager, reporting to the Body Corporate Chairperson. He explained the layout of the building, shared areas and registered easements and the importance of them to him as building manager.

[60] Mr LeRoy said that, on 20 June 2020, the Body Corporate Chairperson received an email from the residents of one Apartment concerned that the hoardings left insufficient space for their son's wheelchair to get to and from the carpark. The Body Corporate Chairperson forwarded the email to Mr LeRoy for action.

[61] Mr LeRoy understood the Body Corporate had notified Mr Cairns (the Hotel's chief engineer) of the issue and requested it be addressed urgently. Mr LeRoy had also been in contact with Mr Cairns at this time regarding other issues that needed to be addressed as the Hotel prepared to become a MIF. There was some delay before Mr Cairns took any satisfactory action.

[62] On 21 June 2020, Mr LeRoy received an email from the same residents repeating their concerns about their son's wheelchair and attaching a photograph to demonstrate the problem. Due to the urgency of the request, Mr LeRoy slightly moved the hoardings in the Easement Area to allow sufficient space for a wheelchair to access and exit the car park. Mr LeRoy said he did not vandalise the hoardings or tamper with locks.

[63] Mr LeRoy said that on 21 June 2020 he emailed Mr Abraham and Mr Cairns, reminding them to ensure there was a minimum gap of 1.2 metres to enable wheelchair access to and from the Apartments.

[64] Mr LeRoy received another letter from Mr Tan dated 21 June 2020, threatening legal proceedings and claiming Mr LeRoy was recalcitrant. The letter purported to forbid Mr LeRoy from entering the Hotel premises. Mr LeRoy said he was not contacted by the police regarding this incident.

[65] Mr LeRoy said all his actions were done in the scope of his role as building manager and acting on behalf of the Body Corporate. The Body Corporate Committee had informed him it did not accept that Mr LeRoy could be legitimately trespassed from the shared areas given he was acting as the Body Corporate's agent. He was aware the Body Corporate had disputed the trespass notice through its lawyer's correspondence with SPAK/SPAK's former counsel.

The Door Knocking Incident — 4 July 2020

[66] Mr Abraham said Mr LeRoy disturbed a SPAK employee while he was resting in his room at the Hotel. The employee filed an incident report with the Hotel which was then sent to the police. The report was that someone banged on the door and, when the employee looked through the peephole, nobody was there. There was then

further banging and, when the employee opened the door, he saw Mr LeRoy standing on the "Residence's [sic] side … staring fiercely and aggressively". The employee took a photograph, fearing for his safety. There was no affidavit evidence from the employee.

[67] Mr Abraham described Mr LeRoy's behaviour as confrontational. He said other staff members had felt threatened by Mr LeRoy who gave the impression he was about to physically assault them.

[68] Mr LeRoy said one concern about use of the Hotel as a MIF was the potential risk presented by Hotel rooms located on Levels 3 and 4 that had access to the residents' side of the Easement Area, in particular, rooms 423 and 323. He said he had raised a concern with the Hotel and understood these rooms would not be used. Mr LeRoy was contacted by a concerned resident of the Apartments who believed Room 323 was being used. He went to check by knocking on the door as he stood on the residents' side of the Easement Area. He stood back and the door was answered. He denied the allegations in the Hotel's incident report that he acted inappropriately. He denied his actions amounted to a trespass and noted the Hotel confirmed he was "standing on the Residence's side". He said he had video footage that corroborated his account.

[69] In Mr LeRoy's second affidavit he referred again to the video recording, saying he could present it to the court in support of his application for summary judgment.

The Letter Drop Incident — 22 July 2020

[70] Mr Abraham deposed that, on 22 July 2020, CCTV footage showed Mr LeRoy trespassing on Level 4 of the Hotel. He exhibited two stills from the footage which showed Mr LeRoy putting letters over the hoardings on the fourth floor and into the area intended for access by those residing at the Hotel.

[71] Mr LeRoy outlined the contents of a letter dated 13 July 2020 distributed on the Hotel's letterhead on behalf of SPAK to residents of the Apartments inviting them to participate in a "class action" against Mr LeRoy and others. A further letter to residents, dated 21 July 2020, was distributed on behalf of SPAK, criticising the Body

Corporate for engaging legal representation in respect of the use of the Hotel as a MIF. The letter alleged Mr LeRoy had a history of misconduct and threatening behaviour and informed residents that SPAK was withdrawing various benefits from them.

[72] Mr LeRoy said he became aware that the Hotel had been distributing the two letters (the Letters) using couriers who did not use personal protective equipment and who had taken the Letters directly from the Hotel while it was a MIF into the Apartments, leading to a concern about potential contamination. He also found a pile of the Letters on a table on a shared area of Level 3 that had apparently been placed there by someone from the Hotel. He pointed out that the Body Corporate's mailroom had a well-signposted policy prohibiting unsolicited mail. Due to concerns about contamination and to ensure the safety of the residents, Mr LeRoy returned the Letters to the Hotel over the hoardings on the fourth floor.

[73] Mr LeRoy said the Chairperson of the Body Corporate had directed him to remove the Letters, as confirmed by an email dated 21 July from the Chairperson to Mr LeRoy, the Body Corporate's lawyer and others. The email, which was exhibited to Mr LeRoy's second affidavit, said, "this needs to stop from the hotel's side", that the Hotel had breached confidentiality and that the second letter "is now bordering [on] harassment".

Application to adduce further evidence on appeal

[74] SPAK applied for leave to adduce further evidence for the purpose of the appeal in the form of an affidavit from Mr Tan and two from SPAK's former counsel. Mr LeRoy opposed the application and applied for leave to adduce an affidavit from Saya Nakamura.

[75] In order for fresh evidence to be admitted on appeal it must be fresh, credible and cogent.[6]

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6 *Rae v International Insurance Brokers (Nelson Marlborough) Ltd* [1998] 3 NZLR 190 (CA) at 193, cited with approval in *Aotearoa International Paper Ltd v Paper Reclaim Ltd* [2006] NZSC 59, [2007] 2 NZLR 1 at [6].

[76] Mr Tan is employed by the Stamford group of companies as the Deputy Chief Executive Officer of Stamford Land Corporation Limited, the owner and operator of the Hotel, which is managed by SPAK, and Chief Legal Officer of Singapore Shipping Corporation Limited in Singapore. Mr Tan leads the in-house legal team which instructed SPAK's external counsel in relation to these proceedings.

[77] Mr Tan said the purpose of his affidavit was to ensure that evidence of the general context of the events was before this Court, in light of the fact that nearly two years had passed and that the public's understanding of and attitudes towards COVID-19 had evolved considerably. Mr Tan was based in Singapore throughout the relevant period but said he followed events in New Zealand closely. His affidavit discussed New Zealand's response to the pandemic in 2020 and the steps the Hotel took to operate as a MIF. He then discussed the three incidents in an effort to demonstrate that SPAK's concerns were to ensure that Mr LeRoy could not jeopardise the safety protocols which SPAK had put in place in the Hotel as a MIF.

[78] SPAK's former counsel's first affidavit sought to address the adverse findings of the Judge in respect of the proceedings and whether or not the existence of the Easement was sufficiently brought to the attention of Davison J when the application for interim injunctive relief was sought. His second affidavit addressed the release of the draft judgment to counsel which we discuss later under the heading "natural justice".

[79] Ms Nakamura is a legal secretary employed by the law firm instructed by Mr LeRoy. She provided documents and correspondence the firm had received from the High Court in respect of this matter, including a transcript of the hearing when SPAK sought and was granted the interim injunction against Mr LeRoy. There is no objection to this evidence and it is admissible.

[80] We agree with Mr Morrison for Mr LeRoy that the affidavits from Mr Tan and SPAK's former counsel concerning the background to the proceedings fail to meet the freshness requirement. Mr Tan's evidence in particular poses some problems, given he was not in New Zealand at the time of the events in question.

[81] In respect of SPAK's former counsel's affidavit about the interim injunction application, we now have a transcript of the hearing and, as such, his recollection of the hearing does not assist.

[82] In summary, we have had regard to the transcript of the interim injunction hearing and the minute and related correspondence between counsel and the Court in respect of the Judge's draft judgment. For completeness, we record that we have obtained a transcript of the hearing before the Judge as that enabled us to deal with some of the criticisms of the hearing made on behalf of SPAK, given that SPAK instructed new counsel for this appeal.

Judgment under appeal

Summary judgment application

[83] The Judge noted that it is a defence to a claim of trespass to land if the defendant were exercising rights under an easement.[7] The Judge observed that all three incidents happened on the Easement Area and on the residents' side of the barrier (hoardings) the Hotel had installed. Mr LeRoy had the benefit of the Easement as agent and contractor of the Body Corporate and, as the designated building manager, was within the definition of "grantee" under the Easement.[8]

The Hoardings Incident

[84] The Judge did not accept the Hotel's claim that Mr LeRoy vandalised the barrier and tampered with the locks. Referring to the case of *Westpac v Kembla*, he said that SPAK could be expected to respond to Mr LeRoy's affidavit evidence with evidence of its own, and if someone really had seen Mr LeRoy vandalising the barrier, there should have been no difficulty in the witness providing an affidavit to that effect.[9] He noted that Mr Abraham did not refer in his affidavit to Mr LeRoy's 21 June email (referring to the hoardings' obstructing wheelchair access) although it was clearly

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7 Judgment on appeal, above n 1, at [20].
8 At [21]–[22].
9 At [26], citing *Westpac Banking Corp v MM Kembla New Zealand Ltd* [2001] 2 NZLR 298 (CA) at [63].

relevant. Mr Abraham's affidavit for the formal proof hearing contained no evidence about damage to the hoardings.[10]

[85] The Judge found that Mr LeRoy was entitled to move the hoardings to make enough space for a wheelchair to pass, as moving a person by wheelchair was within the scope of the Easement. Narrowing the passageway so a wheelchair could not pass was an obstruction of the right and substantial interference with the Easement. The Body Corporate was entitled to move the obstruction and to abate the nuisance.[11] As building manager, Mr LeRoy was the appropriate person to do this.

[86] The Judge described SPAK's reaction as hostile. Mr LeRoy's presence on the Easement Area was not a trespass as he was lawfully there. Notwithstanding that, from that time SPAK treated him as banned from using those parts of the Hotel where the Body Corporate had rights of access. That was flawed. SPAK could not take away Mr LeRoy's rights under the Easement — but it set the scene for treating him as a trespasser on 4 and 22 July.[12]

The Door Knocking Incident

[87] The Judge noted that SPAK did not provide any evidence to rebut Mr LeRoy's affidavit account that he simply knocked on the door and stood back, observing that it could be expected to respond with evidence of its own if it had an answer. The Judge and counsel had viewed Mr LeRoy's cellphone footage of the incident. The Judge described the footage as consistent with Mr LeRoy's version, not SPAK's.[13]

[88] The Judge noted that the Hotel room opened onto the Easement Area. Mr LeRoy was entitled to use the Easement Area to access the servient land, including the room. In checking whether someone was using the Hotel room, he was doing his job as the Body Corporate building manager and did not trespass.[14]

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10 At [26].
11 At [27].
12 At [29]–[31].
13 At [33].
14 At [35].

The Letter Drop Incident

[89] While the Judge acknowledged that Mr LeRoy may have had his own personal interest in seeing the residents did not read the Letters, he said there was no duty to receive unsolicited mail. Returning unwanted mail to the sender by leaving it on its property did not constitute a trespass to land. Mr LeRoy was lawfully on the Easement Area under the terms of the Easement and therefore was not trespassing.[15]

Conclusion on summary judgment

[90] The Judge concluded that Mr LeRoy succeeded on his summary judgment application because he had shown SPAK could not succeed in its trespass claim against him. He had a valid defence — as building manager, he was lawfully on the Easement Area pursuant to the Easement on each occasion.[16] SPAK could not unilaterally prevent access to those who had the benefit of the Easement. That would be a derogation from grant and would allow the grantor to act capriciously, as this case showed.[17]

Strike out application

[91] The Judge considered the strike out application was relevant to whether there should be increased or indemnity costs and so addressed it.[18]

[92] The Judge agreed with Mr LeRoy that SPAK's claim was frivolous and trivial and lacked the seriousness required for a High Court proceeding. If Mr LeRoy did trespass, the incidents were "insignificant, momentary and part of the normal jostle of everyday life".[19]

[93] The Judge was of the view the proceedings were an abuse of process by using the procedures of court for an improper purpose.[20] He noted that the focus is on the purpose of the proceeding rather than the motive of the person starting it; the improper

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15 At [39].
16 At [44].
17 At [41].
18 High Court Rules 2016, r 14.6.
19 At [47].
20 At [48] citing *Rafiq v Secretary for the Department of Internal Affairs* [2014] NZHC 2064 at [23]–[24].

purpose must be predominant but need not be the only one; and proof of an improper act is not required but evidence of an improper act may go to establish improper purpose.[21]

[94] The Judge outlined the extensive history of bad feelings between SPAK and Mr LeRoy. He referred to SPAK's accusations and claims against Mr LeRoy. He considered several of SPAK's letters involved making mischief between Mr LeRoy and the residents of the Apartments and they suggested that the relationship between the residents and SPAK would be better without Mr LeRoy.[22] He referenced the Body Corporate Chairperson's email, authorising Mr LeRoy's return of the Letters and recording his concerns with SPAK's behaviour, and observed that did not suggest any lack of confidence in Mr LeRoy.[23]

[95] The Judge said the two incidents on which the Hotel based its claim were trivial. The rush to law raised a question about the purpose of the proceeding.[24] The Easement's dispute provision was to encourage resolution of differences over its use and bypassing alternative dispute provisions may involve a misuse of the court process. Mr LeRoy, through his lawyer, had proposed a meeting to discuss issues but was spurned by SPAK. That suggested to the Judge that SPAK was not genuinely interested in resolving the problem with the Body Corporate's use of the Easement.[25]

[96] The Judge referred to SPAK's difficulties with the Body Corporate, which was concerned for the residents' welfare when SPAK set up the MIF in June 2020. SPAK objected to Mr LeRoy's actions as the Body Corporate's building manager in upholding its interests. SPAK could have taken up matters directly with the Body Corporate — as the parties had an ongoing relationship, there were greater chances of a negotiated resolution. The Judge noted that the Body Corporate had already instructed lawyers, something the Hotel referred to in its 21 July letter, but that Mr LeRoy was an easier target.[26]

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21 At [49], citing *Williams v Spautz* (1992) 174 CLR 509 (HCA).
22 At [51]–[64].
23 At [60].
24 At [65].
25 At [66].
26 At [67].

[97] The Judge expressed surprise, given the weakness of its case, that SPAK obtained the interim injunction against Mr LeRoy. He inferred that SPAK presented the case for the interim injunction as a straightforward trespass without any easement issues and portrayed Mr LeRoy as abusive, aggressive, unwilling to give an undertaking and a danger to the MIF and Hotel staff. He considered that the statement of claim contained irrelevant allegations and did not refer to the Easement.[27] While Mr Abraham's affidavit in support of the application for the interim injunction referred to the areas on the third and fourth floors as a "shared area", he did not specifically say the Hotel was subject to an easement in favour of the Body Corporate. He considered the written submissions filed in support were no more enlightening, saying the fact this area was subject to the Easement was left obscure.[28] Further, SPAK omitted relevant information, including inconvenient facts. Mr LeRoy's failure to sign the undertaking demanded by SPAK would not appear as concerning if it were known that, through his lawyer, Mr LeRoy had earlier proposed a meeting to resolve the issues which was rejected by SPAK. SPAK omitted to file the lawyers' correspondence.[29]

[98] The Judge queried the terms of the injunction which, in essence, required Mr LeRoy to obtain SPAK's permission to enter the Easement Area. He referred to Mr LeRoy's request for access to the Easement Area and SPAK's former counsel's response that the terms of the injunction did not provide for it and SPAK did not agree to vary the injunction. The Judge said this was wrong and the injunction did not ban Mr LeRoy from the Easement Area.[30]

[99] The Judge referred to SPAK's letters to the residents shortly before the AGM and observed that Mr LeRoy's resignation was what SPAK had wanted.[31]

[100] The Judge concluded that the case was not about SPAK seeking vindication of its property rights — if it were really concerned that Mr LeRoy was improperly using the Easement it would have used the dispute resolution procedure under the Easement. He said the matter should never have gone to court, least of all the High Court. The

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27 At [69]–[72].
28 At [73].
29 At [76]–[77].
30 At [84]–[85].
31 At [87]–[90].

Judge considered SPAK was annoyed with Mr LeRoy because he had raised concerns about the welfare of the residents when the Hotel became a MIF. It banned him from the premises to teach him a lesson which was calculated to make it difficult for him to carry out his job. At the same time, it tried to weaken the Body Corporate's confidence in him. The incidents sued for were trivial, were a pretext to put pressure on Mr LeRoy and involved flimsy evidence. SPAK took advantage of Mr LeRoy procedurally by suing in the High Court when he could not match SPAK's resources. It gave him little time to oppose the interim injunction application and used the interim injunction improperly to prevent him from using the Easement as entitled. It also used it to diminish his standing in the eyes of the residents. SPAK acted improperly — the claim was not about upholding property rights but about oppressing Mr LeRoy.[32]

[101] The Judge described the case as an abuse of process. He said that, if he had not given summary judgment against SPAK, he would have struck out the statement of claim and dismissed the proceeding.[33]

Relevant law

[102] At this stage, it is worth briefly summarising the law which applies to these proceedings —the law of trespass and easements.

(i) Trespass

[103] Trespass is an unjustified direct interference with land in another's possession. The cause of action protects the possessory interest. Although the act of trespass must be intentional, honest mistake affords no defence.[34]

Trespass by a thing entering land

[104] Directly causing something to go onto the land of another is a trespass. Causing the following items to go onto land has been considered a trespass: a car;[35]

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32 At [91]–[92].
33 At [93].
34 *BEMA Property Investments Ltd v Body Corporate 366611* [2017] NZCA 281, [2018] 2 NZLR 514 at [45].
35 *Mayfair Ltd v Pears* [1987] 1 NZLR 459 (CA).

spoil/debris/litter from a gutter;[36] firecrackers, stones, earth, and rubbish; [37] a bathing machine;[38] hunting dogs; [39] and a creeper growing over a gutter.[40]

Is returning goods to their owner a defence?

[105] *Halsbury's Laws of England* describes the following as a defence to trespass:[41]

> If a person wrongfully places his own goods on the land of another, the occupier of the land is entitled to enter the land of the owner of the goods for the purpose of depositing the goods there.

Remedies

[106] The two remedies for trespass are damages and an injunction.[42]

[107] Trespass is actionable per se, without proof of any actual damage.[43] A successful plaintiff is entitled to an award of a token sum of nominal damages as recognition and vindication of their possessory right.[44] A nominal award of damages is appropriate where a claimant proves a wrong actionable per se but no appreciable recoverable damages resulting from it. Case law contains awards of anywhere from $1.00 to $1000.00.[45] The right to sue for nominal damages is subject to the Court's inherent jurisdiction to strike out a claim as an abuse of process.[46]

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36 *Hallenstein Bros Ltd v Lewis & Co* [1917] NZLR 592.

37 *Matheson v Northcote College Board of Governors* [1975] 2 NZLR 106.

38 *Mace v Philcox* (1864) 143 ER 920.

39 *League Against Cruel Sports Ltd v Scott* [1985] 2 All ER 489 (QB).

40 *Simpson v Weber* [1925] All ER Rep 248.

41 *Halsbury's Laws of England* (5th ed 2021, online ed) Vol 97A Tort at [183]. Citing as authority *Rea v Sheward* (1837) 2 M & W 424, 173 ER 1097. See also Stephen Todd *The Laws of New Zealand – Tort* (online ed, LexisNexis) "Trespass to Land" at [223].

42 Stephen Todd (ed) *Todd on Torts* (8th ed, Thomson Reuters, Wellington, 2019) at [9.2.07].

43 *Re Chase* [1989] 1 NZLR 325 (CA) at 340–341; and *Cousins v Wilson* [1994] 1 NZLR 463 (HC).

44 *Mayfair Ltd v Pears*, above n 51, at 465–466.

45 For example, *Cousins v Wilson*, above n 59 (trespass to land; $2500 awarded); *Dehn v Attorney-General* [1988] 2 NZLR 564 (HC) (trespass to land: $1 awarded — appeal dismissed in *Dehn v Attorney-General* [1989] 1 NZLR 320 (CA)); *Zondag v Zondag* HC Hamilton CIV-2003-419-328, 19 June 2007 (trespass increased the value of the land: $1 awarded); *Ogle v Aitken* [2017] NZHC 1799, [2018] NZAR 1898 ($1000 to recognise breach of plaintiff's rights as landowner by trespassing soil following excavation).

46 Todd, above n 58, at [25.2.01]. This proposition is supported by this Court's decision in *Re Chase*, above n 59, where it was held that the claim for nominal damages for trespass to a flat was an abuse of process as the transparent purpose of the claim was to ventilate allegations of police misconduct in connection with a shooting.

[108] Compensatory damages are awarded to put the plaintiff into the position they would have been in if the wrong had not occurred. For a claim in tort, this means the position the claimant was in before the tort was committed.[47]

[109] Exemplary damages may be awarded where a defendant acts in contumelious disregard of the plaintiff's rights.[48]

[110] The prima facie rule is that "a landowner, whose title is not in issue, is entitled to an injunction to restrain trespass on his land whether or not the trespasser harms him."[49]

(ii) Easements

[111] An easement is an interest in land, which involves the right to use the land of another person (the servient land) in a specified way without any right of occupation. An easement can have the effect of restricting a landowner's use of the servient land.[50]

[112] The grant of an easement carries with it such ancillary rights as are reasonably necessary for the effective and reasonable exercise and enjoyment of the rights expressly granted.[51] For example, a right of way easement, which carries a right to pass over another person's land, may include stopping on the right of way for a reasonable amount of time for the purpose of loading or unloading goods.[52] But the exercise of ancillary rights is restricted to the exercise of the rights expressly granted and any use of the servient land beyond those rights and purposes is a trespass.[53]

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47 Todd, above n 58, at [25.2.01].

48 *Mayfair Ltd v Pears*, above n 51, at 465–466.

49 *Patel v WH Smith (Eziot) Ltd* [1987] 1 WLR 853 (CA) at 858.

50 DW McMorland and others *Hinde McMorland & Sim Land Law in New Zealand* (online ed, LexisNexis) at [16.001]–[16.002]; and *Halsbury's Laws of England – Real Property and Registration* (online ed, LexisNexis) at [725].

51 McMorland and others, above n 66, at [16.038].

52 McMorland and others, above n 66, at [16.038]; *Grinskis v Lahood* [1971] NZLR 502; *McIlraith v Grady* [1967] 3 All ER 625 (QB); and *Bulstrode v Lambert* [1953] 1 WLR 1064 (Ch).

53 McMorland and others, above n 66, at [16.038]. Citing *Pwllbach Colliery Co Ltd v Woodman* [1915] AC 634 (HL) at 646; *Mercantile General Life Reassurance Co v Permanent Trustee Australia Ltd* (1988) 4 BPR 97, 297; and *William Old International v Arya* [2009] EWHC 599 (Ch) at [31].

Misuse of easements

[113] The courts will construe the rights strictly in accordance with the terms of the easement so as not to burden the servient land nor benefit the dominant land beyond the terms expressed. Where the use of a right of way is excessive or beyond the terms of the grant, the dominant owner will be liable in trespass and may be restrained by injunction.[54]

"Civiliter" principle

[114] In *Moncrieff v Jamieson,* the House of Lords addressed whether a right to park was ever capable of being ancillary to "an admitted servitude of vehicular access."[55] It said that a subsidiary issue was the application of the principle that any use of the servient land must be civiliter.[56] This principle:[57]

> … requires the dominant owner … to exercise the right reasonably and without undue interference with the servient owner's enjoyment of his own land. The converse of this principle is that an interference by the servient owner with the dominant owner's exercise of the servitude will not be an actionable inference unless it prevents the dominant owner from making a reasonable use of the servitude. …

[115] *Saint v Jenner* was cited by way of example.[58] In that case, the dominant owner had been driving at excessive speeds on a vehicular right of way. This use was held to be unreasonable and inconsistent with the civiliter principle. However, it did not entitle the servient owner to erect speed bumps of such severity that a car moving at 10–15 mph would be unable to cross them.

[116] The House of Lords ultimately decided that the ability to park was necessary to enjoy the rights under the easement and did not cause unreasonable interference with the grantor's rights.

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54 *Hamble Parish Council v Haggard* [1992] 1 WLR 122 (Ch) at 133–134.
55 *Moncrieff v Jamieson* [2007] UKHL 42, [2007] 1 WLR 2620 at [20] and [45].
56 At [20].
57 At [45].
58 At [45], citing *Saint v Jenner* [1972] 3 WLR 388 (CA).

[117] In the New Zealand context, *Moncrieff v Jamieson* and the civiliter principle were discussed by this Court in *Breslin v Lyons*.[59] This Court noted that *Moncrieff* was decided in a factually specific situation and that the decision was primarily one of contractual construction.[60]

[118] This Court explained that the principle simply required that the dominant owner's use of the servient land be reasonable. Provided that the dominant owner's use was for the agreed purposes of access within the meaning of the grant, it could not be unreasonable or inconsistent with the servient owner's beneficial ownership of their property.[61]

Variation of easements

[119] One party cannot unilaterally restrict or curtail the other party's use of an easement. Easements may be varied either by agreement or by an order of the High Court under s 317 of the Property Law Act 2007.[62]

[120] In *Okey v Kingsbeer*, this Court considered an appeal arising from a dispute over an unregistered right of way easement. The dispute had arisen because of increased use of the right of way. In 2013 the servient owner's solicitors wrote to the dominant owner's solicitors saying, "Please accept this letter as formal cancellation of the proposed easement granted 1 July 2009, effective 1 March 2013".[63]

[121] This Court held that the dominant owner could increase its use of the right of way so long as the more intrusive use fell within the plain meaning of the terms of the easement. This Court explained that an easement:[64]

> … cannot be cancelled or limited unilaterally by one party, as the respondents purported to do in 2013. Thus it is only the remedial power of the Court under s 317 that would allow modification or extinguishment as a result of any changed use of this kind.

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59 *Breslin v Lyons* [2013] NZCA 161, (2013) 14 NZCPR 144.
60 At [28]–[29].
61 At [30].
62 Elizabeth Toomey (ed) *New Zealand Land Law* (online ed, Thomson Reuters, New Zealand) at [48.R.10.6].
63 *Okey v Kingsbeer* [2017] NZCA 625, (2017) 19 NZCPR 25 at [20].
64 At [50].

Nuisance

[122] *Hinde McMorland & Sim Land Law in New Zealand* explains that "[a]s with any other easement, any wrongful interference with a right of way constitutes a nuisance."[65] Examples of obstructions which might, in certain contexts, interfere with a right of way include the planting of trees,[66] the installation of ramps which made the road hard to drive on,[67] the installation of a gate,[68] and the parking of vehicles for an extended period of time.[69] Not every obstruction amounts to an unlawful interference with a right of way.[70] No action will lie unless there is a substantial interference with the rights granted.[71]

[123] In the present case, the Easement was registered against the titles to the building. The Land Transfer Regulations 2018 provide that:[72]

> A right of way includes the right to have the easement facility kept clear at all times of obstructions (whether caused by parked vehicles, deposit of materials, or unreasonable impediment) to the use and enjoyment of the easement facility.

[124] We now turn to the appeal and will address first summary judgment and, secondly, strike out.

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65 DW McMorland and others, above n 66, at [16.050]. Citing *McKellar v Guthrie* [1920] NZLR 729 at 731; *Saint v Jenner*, above n 74; *Handforth v Kokomoko Farms* (2010) 11 NZCPR 171 at [44]–[49]; and *Iakopo v Rutherford* [2012] NZHC 1557 at [15].

66 *McKellar v Guthrie*, above n 81. Although in this case, the court ruled that the trees were not operating to the prejudice of the party who cut them down because there was no evidence she did so because she wished to access her right of way — rather they were cut down for the purpose of firewood.

67 *Saint v Jenner*, above n 74.

68 *Iakopo v Rutherford*, above n 81.

69 *Lyons v Breslin* (2010) 11 NZCPR 262.

70 *Emmons Developments (NZ) Ltd v RFD Investments Ltd* HC Christchurch CP42/01, 4 July 2001 at [43].

71 *Iakopo v Rutherford*, above n 81, at [15].

72 Land Transfer Regulations 2018, sch 5, cl 6(3).

SUMMARY JUDGMENT

The law

[125] Rule 12.2(2) of the High Court Rules 2016 provides that the court may give judgment against a plaintiff if the defendant satisfies the court that none of the causes of action in the plaintiff's statement of claim can succeed.[73]

[126] This Court discussed the distinction between a defendant's application for summary judgment and a strike out application in *Westpac Banking Corp v MM Kembla New Zealand Ltd*.[74]

[127] When a claim is untenable as a matter of law, a defendant can apply to strike out the claim. Rule 186 (now r 12.2(2)) permits a defendant who has a clear answer to the plaintiff, which cannot be contradicted, to submit the evidence which constitutes the answer so that the proceedings can be summarily dismissed. Applications to strike out are usually determined on the pleadings alone, whereas summary judgment requires evidence. A summary judgment is a judgment between the parties on the dispute which operates as an issue estoppel, whereas if a pleading is struck out as untenable as a matter of law, the plaintiff is not precluded from bringing a further properly constituted claim.[75]

[128] The defendant has the onus of proving on the balance of probabilities that the plaintiff cannot succeed. Usually, summary judgment for a defendant will arise where the defendant can offer evidence which is a complete defence to the plaintiff's claim.[76]

[129] This Court in *Westpac* explained that summary judgment will be inappropriate where there are disputed issues of material fact or where material facts need to be ascertained by the court and cannot confidently be concluded from affidavits. It may also be inappropriate where the ultimate determination turns on a judgment which can only be properly arrived at after a full hearing on the evidence.[77] Summary judgment

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73 High Court Rules, r 12.2(2).
74 *Westpac v Banking Corp v MM Kembla New Zealand Ltd*, above n 25.
75 At [60].
76 At [61].
77 At [62].

will be suitable for cases where abbreviated procedure and affidavit evidence will sufficiently clearly expose the facts and legal issues. Although a legal point may be as well decided on summary judgment application as at trial, if sufficiently clear, novel or developing points of law may require the context provided by trial to provide the court with sufficient perspective.[78]

[130] Except in clear cases, such as a claim for a simple debt where it is reasonable to expect that proof is immediately available, it will not be appropriate to decide the sufficiency of the proof of the plaintiff's case by summary procedure. Otherwise, this would permit a defendant, who is perhaps more in possession of the facts than the plaintiff, to force the plaintiff's case prematurely before completion of discovery and other interlocutory steps and before the plaintiff's evidence can reasonably be assembled.[79]

[131] It is not necessary for the plaintiff to offer evidence at all, although, if the defendant supplies evidence which would satisfy the court that the claim cannot succeed, a plaintiff will usually have to respond with credible evidence of its own. It is not enough to show weakness in the claim. The assessment made by the court on an interlocutory application is not one to be arrived at on a fine balance of the available evidence, such as is appropriate at trial.[80]

Submissions

[132] Mr Salmon KC, for SPAK, submitted SPAK's trespass claims were at least arguable and had a real chance of success. Questions of reasonable use of the Easement Area and undue interference with SPAK's enjoyment of its own land could not be adequately resolved without a substantive hearing. Mr Salmon said Mr LeRoy's defence raised multiple disputed questions of fact as to the nature, extent and purpose of his conduct which could not be determined on the affidavit evidence; this was not a "clear case" in terms of *Westpac v Kembla*.

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78 At [62].
79 At [63].
80 At [64].

[133] Mr Salmon contended that Mr LeRoy's actions were not within the terms of the Easement. His unilateral interference with the MIF hoardings and unauthorised "return" of mail over the hoardings into a controlled MIF were demonstrably outside the reasonable use of any easement rights and constituted trespass. There was at least an arguable case that Mr LeRoy's conduct on 4 July 2020 also fell outside the reasonable use of the Easement. Mr Salmon referred to the civiliter principle that easements must be used civilly, courteously and reasonably, and not to the detriment of others.

[134] In Mr Salmon's submission, the Judge wrongly dismissed evidence of SPAK's heightened concerns about Mr LeRoy's conduct and its implication for the safe operation of the MIF. The Judge described this as a "supposed" risk on which SPAK played to get "around the triviality problem" and concluded that "Mr LeRoy's actions had nothing to do with compromising the operation of the isolation facility".[81]

[135] In Mr Salmon's submission, the prior incidents allegedly involving Mr LeRoy formed part of the relevant context for SPAK's fears that Mr LeRoy would act in a manner that could compromise its safety protocols and explained why SPAK brought the proceedings against Mr LeRoy seeking injunctive relief.

[136] Mr Salmon also submitted that the determination of the summary judgment (and strike out) applications suffered from procedural irregularities, including that the Judge:

(a) Had regard at the hearing to a video recording that had not been put in evidence, that SPAK was not on notice would be relied on and referred to at the hearing, and to which SPAK was not given an adequate opportunity to respond; and

(b) Instigated a confidential exchange with SPAK's then counsel following the hearing on matters relating to the Judgment while precluding disclosure on this exchange to SPAK or allowing counsel to take instructions on it.

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81 Judgment on appeal, above n 1, at [79]–[80].

[137] In Mr Morrison's submission, this was an appropriate case for summary judgment. He said the facts material to determining if the incidents amounted to a trespass were not in dispute. Mr LeRoy had a lawful right to be upon the Easement Area for each incident. SPAK's claim was based on the false assumption it could unilaterally restrict him from these areas. COVID-19 did not permit grantors of easements to derogate from grant.

[138] Mr Morrison said a trial was not required to determine if Mr LeRoy's actions fell within the scope of his rights under the Easement. The evidence confirmed his actions were carried out in the course of his duties as building manager. The Judge was entitled to adopt the approach he did and not uncritically accept SPAK's allegations.

Discussion

The Hoardings Incident

[139] Mr Salmon suggested that there must have been some sort of agreement between SPAK and the Body Corporate in respect of the erection of the hoardings on the Easement Area. However, there is no evidence of any such agreement. It is reasonable to assume that, had there been, then this would have been put in evidence by SPAK when it applied for the interim injunction. This would have been in accordance with SPAK's obligation of full disclosure and candour and, in any event, would have supported its application. The only evidence suggests that, at best, the Body Corporate acquiesced to the hoardings.

[140] Reliance on the civiliter principle as a justification for the erection of the hoardings is misconceived. Mr LeRoy, as building manager, had the benefit of the Easement and was entitled to take reasonable steps to remove any obstruction to it.[82] It is clear that Mr LeRoy moved the hoardings the minimum amount necessary.

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[82] There was some suggestion at the hearing before the Judge that the right of way was pedestrian only, the implication being that it could not be used for a wheelchair. Counsel for SPAK quite properly did not pursue the point. There can be no doubt that such use would be covered by the Easement, if not directly, then as an ancillary use.

[141] SPAK provided no evidence in response to the assertion Mr LeRoy moved the hoardings to allow a wheelchair-bound resident to use the Easement Area and that SPAK had been informed of this. Contemporaneous emails demonstrated this was an urgent situation that required redress and that this issue was raised with SPAK.

[142] The Judge was correct in his observation that the Hoardings Incident could not form the basis of a trespass notice because Mr LeRoy was not trespassing but exercising his rights pursuant to the Easement.

[143] Turning to the two incidents the subject of the claim, there is no disagreement that, at all times, Mr LeRoy was on the Easement Area and on the side SPAK had designated for use by the residents of the Apartments.[83]

The Door Knocking Incident

[144] SPAK claims Mr LeRoy committed trespass by knocking on a Hotel room door to check if the room was occupied.

[145] The Judge asked counsel whether SPAK's case was that, by (allegedly) looking fierce and aggressive, Mr LeRoy had exceeded the terms of the Easement. SPAK's position was that it had a right to control the use of the Easement to prevent Mr LeRoy from being there "per se". That proposition is simply incorrect. Alternatively, SPAK's case was that Mr LeRoy was not on the Easement Area for a legitimate or justified purpose but for the sole or principal purpose of "intimidation". The evidence in relation to this incident consisted of a blurry photograph of Mr LeRoy, produced by SPAK, and Mr LeRoy's cellphone video recording.

Admissibility of the cellphone video

[146] Mr LeRoy referred to the video recording in his affidavit of 10 February 2021. In his affidavit dated 23 April 2021 in support of his application for summary judgment, Mr LeRoy explained that he had taken a video recording of the Door

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[83] As discussed above, the interference with the right of way by the erection of hoardings could be lawfully achieved only with the agreement of the Body Corporate. There was no direct evidence of this but it is apparent the Body Corporate tolerated the erection of the hoardings at least. Even so, the hoardings could not unreasonably interfere with the use of the right of way.

Knocking Incident on his cellphone, which he could present to the court in support of his application. At the hearing, the Judge asked counsel if they had seen it. Neither had done so and the Judge suggested counsel should discuss the position and view the video. The Judge observed that, even in the photograph, it was obvious Mr LeRoy looked neither fierce nor aggressive.

[147] There was further discussion about the video after the lunch break. Counsel for SPAK confirmed he had viewed the video and had no objection to the Judge viewing it. He said, "it is what it is. It's a video. I don't dispute it". The video was then played.

[148] The Judge then summarised the evidence about the Door Knocking Incident and had the following exchange with SPAK's counsel:

> Q. Well, there are two incidents. On the first one he's had a report that someone is using a hotel room on the Body corporate side of the barrier. And the Body corporate's expectation is that those hotel rooms would not be used because they didn't want people who may be exposed to the virus coming onto the Body corporate side of the barrier. Someone in the Body corporate's got to do something about it. Who gets the job? The building manager's the dogsbody who gets these jobs. He goes and does it. He knocks on the door. He finds there's someone in there. The door gets closed in his face. He's found out there's someone there. That's all the incident is, isn't it?
>
> A. Yes.
>
> Q. All the fierceness and aggression is just hyperbole, isn't it?
>
> A. It may be Sir. Yes.

[149] We do not see any issue with the admissibility of the cellphone video. Mr LeRoy alluded to it in his first affidavit in February 2021. He then clearly signalled, nearly four months prior to the summary judgment hearing, that he had the video and could make it available. SPAK's counsel could have requested to see it at any time prior to the hearing. SPAK's only evidence to support the allegation of trespass in relation to the Door Knocking Incident was in Mr Abraham's affidavit in the form of an exhibited photograph apparently taken by the occupant of the room. This was hearsay. The best evidence of what had occurred came directly from Mr LeRoy by way of his affidavit, supported by the video. It was hardly a surprise, therefore, that the Judge would admit the video in evidence and indeed SPAK's

counsel responsibly took no objection. Its admission was in accordance with s 9 of the Evidence Act 2006.

[150] We have viewed the video of the Door Knocking Incident. We do not consider any reasonable person would accuse Mr LeRoy of acting aggressively or question whether his actions were reasonable. Mr LeRoy's interaction with the staff member was calm, polite, of short duration and clearly within the proper bounds of his duties as building manager.

[151] There is no doubt that the Door Knocking Incident did not involve a trespass. Mr LeRoy was using the Easement Area, as he was entitled to do in connection with his duties as building manager, to check whether the Hotel room was occupied. The cellphone video dispels any suggestion that the sole or principal purpose of him being on the Easement Area was for intimidation.

The Letter Drop Incident

[152] SPAK claims that Mr LeRoy committed a trespass when he deposited the Letters over the top of the hoardings onto the side of the Easement Area the Hotel had designated for its own use.

[153] Depositing letters onto someone's land without their permission could technically constitute a trespass. Here, the area on which the Letters were deposited was subject to the Easement. A finding of trespass would depend on the deposit of the Letters being outside the terms of the Easement and that Mr LeRoy was not entitled to return the Letters.

[154] Mr LeRoy provided evidence that the Body Corporate had a well-signposted policy prohibiting unsolicited mail and that he had returned the Letters to SPAK on instructions from the Body Corporate Chairperson and out of concern for potential infection risks given the Letters came from a MIF. The Letters met the definition of "unaddressed mail" set out in the Body Corporate's applicable rule as they did not include the full name of each resident. There is no duty to accept unwanted mail and an occupier is entitled to return property left wrongly on its land. As building manager, Mr LeRoy was the appropriate person to return unwanted mail.

[155] The Letters were not, as suggested at the interim injunction hearing, for the purpose of attempting to consult with the residents/Body Corporate on health and safety issues. They were an attempt by SPAK to encourage the residents to join a class action against Mr LeRoy in respect of the 2016 Chiller Incident which had been settled. The Body Corporate Chairperson was clearly concerned about SPAK's behaviour, describing it as "now bordering as harassment" and factually inaccurate. He told the Body Corporate's lawyer that he had asked Mr LeRoy "to try and take out" the Letters and that the Body Corporate needed SPAK "to stop this behaviour".

[156] SPAK emphasised the importance of the COVID-19 context and relied on it to justify its actions towards Mr LeRoy and these proceedings. However, the COVID-19 context cuts both ways. The Letters were hand delivered and, in the circumstances of the Hotel being used as a MIF, constituted a potential COVID-19 risk.

[157] Again, the exchange between the Judge and SPAK's counsel is illuminating:

> Q. Well, I imagine his motive was that these letters were showed a lot of good will – ill will towards him, they are arguably defamatory of him, he didn't want them circulated further. There may have been other ways he could have disposed of them but he took the short term measure of just throwing it over the hoarding but your people put them on the body corporate side of the hoarding, he put them back on the hotel side of the hoarding.
>
> A. I accept that, Sir.
>
> Q. He did it more messily than your people did it but messiness doesn't create liability.
>
> A. No, indeed. …

[158] And, we would have expected that any real concerns about the return of the Letters that there might have been in July 2020 would have been put in perspective by the time of the hearing in August 2021, particularly given that by then, Mr LeRoy was no longer the building manager.

Damages

[159] Even if there could have been a finding of technical trespass in respect of the Letters, we cannot see any prospect of an award of damages. Had the formal proof

hearing proceeded, SPAK intended to claim approximately $45,000, being costs it maintained it had to incur to respond to the trespass. They were the costs of purchasing and installing cameras throughout the building from the basement to the roof garden. A claim for such costs in respect of the Door Knocking Incident had no prospect of success. We note no damages were specifically claimed in the application for formal proof in respect of the Letter Drop Incident (or in respect of any damage to the hoardings). Installation of cameras was not by any measure a reasonable response to the alleged trespass. Cameras might well have been important to SPAK, given the Hotel was being used as a MIF, but that cost could not be laid at the feet of Mr LeRoy.

[160] As to the claimed general damages, again there was no prospect of an award. In his affidavit evidence, Mr Abraham had claimed that Mr LeRoy's actions had upset Hotel employees. Even if SPAK were able to produce actual evidence rather than hearsay of any such upset, the claim was not linked to the claimed trespasses in relation to the hoardings or the Letters. Any claim by the occupant of the Hotel room in the Door Knocking Incident of feeling intimidated was dispelled by the video evidence. The only evidence of any adverse impact on a person related to Mr LeRoy. He exhibited to his affidavits letters from his doctor talking about the significant adverse impacts of the proceedings on Mr LeRoy's mental health and wellbeing. He likened Mr LeRoy's response to that suffered by a whistle-blower.

Interim injunction application

[161] The Judge was forthright in expressing his concerns about the interim injunction. We can go no further than observe that, at the least, something appears to have been lost in translation. It was clear from Davison J's decision that he understood Mr LeRoy had no right to be on the Easement Area. He was also told that Mr LeRoy had ignored the trespass notice which SPAK issued following the Hoardings Incident. Davison J was not provided with the context about removal of the hoardings (to allow wheelchair access), nor the offer from Mr LeRoy's lawyers to discuss matters. The dispute resolution provisions in the Easement do not appear to have been brought to his attention. He was aware Mr LeRoy had declined to sign the indemnity proffered by SPAK's lawyers but that indemnity, in the context of the Easement, was completely unacceptable. It is no answer to say it could have been watered down following

negotiation. The indemnity should have been in terms no more than reasonably necessary to abate or prevent the mischief the injunction was designed to address. And SPAK's lawyers had rebuffed any suggestion of a discussion with Mr LeRoy or his lawyers. The terms of the injunction also support an inference that Davison J did not appreciate that the Easement covered the area on which Mr LeRoy was alleged to have trespassed.

Natural justice

[162] The Judge had concerns about certain aspects of the application for interim orders which led him to issue a draft judgment to counsel with a direction that they were not to discuss it with the parties. The Judge did this out of professional courtesy to SPAK's former lawyers. We agree that, while well-intentioned, this was not a proper approach. However, this issue had no bearing on the outcome of the applications for summary judgment and strike out. The exchange with counsel did not involve the substance of the decision but rather appropriate wording in respect of a matter of counsel's conduct. It was not material to the Judge's decision in any way, as evidenced by the fact neither the result nor the reasoning changed. Therefore, while we agree it was a regrettable occurrence, it does not detract from the correct outcome.

Conclusion on summary judgment

[163] This appeal is on the basis that a hearing was required before the court could determine whether Mr LeRoy's use of the Easement Area was reasonable. We accept that rights granted under an easement are subject to express or implied requirements of reasonableness. We do not accept that it was possible to argue that Mr LeRoy's use of the Easement Area was unreasonable. The conduct complained of in the causes of action consists of a door-knock and brief exchange and the deposit of a handful of letters over a barrier. Mr LeRoy was entitled to do both of these things by using the right of way over the Easement Area, particularly given his role as building manager.

[164] The material circumstances in respect of each alleged trespass were not in dispute. Any allegations that are disputed by Mr LeRoy (for example, that he acted aggressively during the Door Knocking Incident) are peripheral to the issue of whether there had been a trespass to land. The Judge was not required to accept uncritically

allegations that inherently lacked credibility and were contradicted by contemporaneous documentary evidence.

[165] The COVID-19 situation was taken into account by the Judge. He was correct in his conclusion that use of the Hotel as a MIF did not permit SPAK unilaterally to derogate from the grant of the Easement. There was no evidence, for example, of a Government order having the effect of cancelling or suspending property rights if land were used for a MIF.

[166] The purpose of defendants' summary judgment is to avoid the need for a full hearing when there is no real prospect of success of a claim. If the evidence offered by a defendant applicant would satisfy the court that the claim cannot succeed, then it is to be expected that the plaintiff will file evidence. It is not enough simply to say that further evidence could be produced at trial. Here, Mr LeRoy's affidavits were firsthand compelling evidence in support of his defence and appeared to give a complete answer. In SPAK's defence of the application it explicitly relied on its affidavit evidence in support of the interim injunction and formal proof application.

[167] The Judge was correct to grant Mr LeRoy's application for summary judgment. He had demonstrated that SPAK could not succeed in its trespass claim against him. He had a valid defence that he was lawfully on the Easement Area on each occasion.

STRIKE OUT

The law

[168] Rule 15.1 of the High Court Rules provides:

> **15. 1 Dismissing or staying all or part of proceeding**
>
> (1) The court may strike out all or part of a pleading if it—
>
> (a) discloses no reasonably arguable cause of action, defence, or case appropriate to the nature of the pleading; or
>
> (b) is likely to cause prejudice or delay; or
>
> (c) is frivolous or vexatious; or
>
> (d) is otherwise an abuse of the process of the court.

…

[169] The court must be satisfied the causes of action are so untenable that they could not succeed.[84] The court will assume the pleaded material facts are true save for those that are entirely speculative and without foundation.[85] If any deficiencies can be cured by an amendment to the pleadings, allowing the claim to proceed on condition the necessary amendments are made is preferable to strike out.[86]

[170] The jurisdiction is one that is to be exercised sparingly and only in a clear case where the court is satisfied it has the requisite material.[87] The fact a claim involves a complex or difficult question of law which requires extensive argument is no bar provided the court has the requisite information and assistance to determine the matter.[88]

Submissions

[171] Mr Salmon challenged the Judge's findings that SPAK had an improper purpose in bringing the proceeding. In his submission:

(a) The Judge erroneously disregarded the COVID-19 pandemic context and evidence of SPAK's concerns about the risks Mr LeRoy's conduct posed to the safe operation of the MIF. This error materially contributed to the Judge's findings as to the reasonableness (and therefore lawfulness) of Mr LeRoy's conduct and the unreasonableness (and therefore purpose) of SPAK's claim.

(b) The Judge made serious adverse findings as to SPAK's purpose in bringing the proceeding, which were wrong as:

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84 *Burns v National Bank of New Zealand Ltd* [2004] 3 NZLR 289 (CA) at [37]; and *Attorney-General v Prince and Gardner* [1998] 1 NZLR 262 (CA) at 267.

85 *Smith v Fonterra Co-Operative Group Ltd* [2021] NZCA 552, [2022] 2 NZLR 284 at [38].

86 At [38].

87 At [38]. See also *Attorney-General v Prince and Gardner*, above n 112, at 267; *Gartside v Sheffield, Young & Ellis* [1983] NZLR 37 at 45; and *Electricity Corporation Ltd v Geotherm Energy Ltd* [1992] 2 NZLR 641.

88 *Smith v Fonterra Co-Operative Group Ltd*, above n 113, at [38]; *Attorney-General v Prince and Gardner*, above n 112; and *Burns v National Bank of New Zealand Ltd*, above n 112; and *Gartside v Sheffield, Young & Ellis*, above n 115.

(i) they were made with reference to factual findings that were plainly wrong on the evidence and material before the Judge, including that SPAK omitted to inform the High Court of the existence of the Easement when it applied for interim injunctive relief;

(ii) they failed to have regard to relevant evidence as to SPAK's understanding of Mr LeRoy's conduct that was wrongly excluded as inadmissible; and

(iii) they wrongly attributed to SPAK a scheduling decision made by the High Court regarding the hearing on the appellant's interim injunction.

[172] Mr Morrison submitted that SPAK's claim was frivolous. It was based on a knock on the door and the dropping of a handful of letters which were rightfully categorised as trifling matters not worthy of the court's time. There was ample foundation for the finding that SPAK's case was an abuse of process with the purpose of oppressing Mr LeRoy. Mr Morrison suggested that SPAK's claims that its purpose was to preserve the integrity of the MIF lack credibility when viewed against its own actions and correspondence prior to litigation. Such concerns were not referred to in its contemporary correspondence and were at odds with its bare refusal to engage with Mr LeRoy prior to filing proceedings. The proceedings had no useful purpose and served as a waste of court resources, particularly given it had been over 16 months since Mr LeRoy ceased working as a building manager.

[173] Mr Morrison submitted that the Judge rightly considered the following factors also revealed SPAK's punitive purposes:

(a) commencing proceedings on trifling matters;

(b) bypassing the dispute resolution mechanisms set out in the Easement;

(c) rebuffing Mr LeRoy's request in his lawyer's letter dated 24 June 2020 for a meeting to try and resolve matters; and

(d) suing in the High Court rather than the District Court.

[174] Mr Morrison submitted that the Judge's characterisation of SPAK's repeated assertions of Mr LeRoy's alleged past transgressions was correct. The incidents alleged in the statement of claim and affidavits were not presented as background or context — they were used to attempt to convince the Court that Mr LeRoy was aggressive and out of control and that SPAK needed the protection of an injunction.

[175] Mr Morrison submitted that the Judge's criticism was not that there had been no reference to the Easement but that SPAK had failed specifically to draw the Court's attention to the Easement as it applied to the location of the alleged trespasses. A reading of Davison J's judgment on the interim injunction and particular comments about Mr LeRoy having "no right" to enter the relevant parts of the Hotel gave strong grounds for suspicion that the nature and terms of the Easement had not been brought to his attention.

Discussion

The strike out application

[176] The Judge granted Mr LeRoy's application for summary judgment. He addressed the strike out application because he considered it relevant to costs, concluding that, had summary judgment not been entered, SPAK's claim would have been struck out as an abuse of process. That is the context for our discussion.

[177] Mr Salmon was critical of the fact Mr LeRoy's strike out application was considered by the Judge. He noted that the strike out was referred to in the submissions on behalf of Mr LeRoy filed only four days before the hearing. A strike out application was not filed until two days before the hearing. We make two points in response. First, it cannot have come as any surprise to SPAK that the summary judgment application would likely be accompanied by an application to strike out given Mr LeRoy's affidavits had alleged improper purpose. SPAK did not apply for an

adjournment of the strike out hearing and its submissions filed in advance addressed the strike out application. SPAK's counsel had no apparent hesitation in arguing against the strike out at the hearing. Secondly, the power to strike out a proceeding does not depend on an application having been made. A judge may strike out a proceeding on his or her own motion.[89]

Frivolous and vexatious

[178] That the proceedings were frivolous by the time of the hearing before the Judge was obvious. Mr LeRoy was no longer the building manager, having lost that role over four months prior to the hearing. There was therefore no prospect of success of the claim for a permanent injunction. Mr LeRoy's mental health had been adversely affected.

[179] There might well have been interpersonal problems between Mr LeRoy and Hotel employees. It appears there was also a very strained relationship between Mr Cairns, the Hotel's chief engineer, and the Body Corporate. These proceedings were not, however, the appropriate way to deal with them. We cannot see any prospect of a judge taking a contrary view.

[180] The only claim which could constitute, at its highest, a trespass is the Letter Drop Incident on the basis that depositing the Letters on the Easement Area was outside the use of the Easement Area as a right of way. The courts have, however, refused to entertain parties' insignificant or frivolous complaints of interference with a right of way.[90] We take the same approach. The Letter Drop Incident, particularly given the circumstances and that the Letters emanated from SPAK in any event, was petty and de minimis. The courts' resources and the power of the law need to be used responsibly.

[181] The Judge was correct the incidents complained of were trivial and unworthy of court time. A strike out of the proceedings would have been warranted.

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89 *Siemer v Stiassny* [2011] NZCA 1 at [14].

90 *Handforth v Kokomoko Farms Ltd*, above n 81 at [44]; and *McKellar v Guthrie*, above n 81 at 731. See also *Grinskis v Lahood*, above n 68.

Improper purpose

[182] The Judge was clearly, with some justification, concerned that SPAK was pursuing its claim against Mr LeRoy. SPAK's then counsel had contended that SPAK's principal objective in bringing the claim was to have its property rights upheld. The Judge challenged counsel on that proposition, saying that on the material before him it appeared as if SPAK had used the proceedings to go out of its way to blacken Mr LeRoy's character. The Judge put SPAK on notice of his concerns,[91] which were supported in large part by SPAK's own evidence and behaviour, for example: reporting the Door Knocking Incident to the police; writing the Letters to the residents; accusing Mr LeRoy of "attempted manslaughter" in respect of his driving in the carpark; reporting that incident to the police, who viewed the CCTV footage and concluded it was insufficient to warrant any further investigation as the police believed no offence had been committed; writing to the residents at the time of the AGM seeking the removal of the Body Corporate's Chairperson and termination of Mr LeRoy's employment/contract as building manager.

[183] The Judge's finding of improper purpose was therefore based on the evidence before him, much of it emanating from SPAK itself. However, while the Judge's scepticism as to SPAK's purpose was understandable, we consider he went too far in some of his observations.

[184] Mr Salmon made extensive reference to the COVID-19 pandemic and the Hotel's function as a MIF. He argued that Mr LeRoy was placing the running of the facility at risk and the proceedings were necessary to ensure it could continue to play its part in keeping New Zealand COVID-free.

[185] The Judge did not ignore this context. He did not accept that Mr LeRoy's actions compromised the facility's operation, finding it hard to accept that Mr LeRoy's actions could be construed as putting anyone at risk from COVID-19.[92] Mr LeRoy returned the Letters, which had originated from the Hotel, without contact with anyone

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91 The Judge discussed his concerns with counsel at the hearing. Counsel fully appreciated the reason for them and suggested it might be appropriate for a memorandum to be filed with the Court. The Court record does not reveal that any such memorandum was filed.

92 Judgment on appeal, above n 1, at [80].

inside the Hotel. The point of MIF was to prevent COVID-19 escaping from the facility rather than entering it. Assuming they originated from inside the Hotel, any risk arose from the Letters themselves.

[186] The COVID-19 environment provides an overlay to events at the time. We can accept that SPAK was legitimately concerned about the financial viability of the Hotel and the need to make its use as a MIF a success. In the circumstances, we consider that SPAK should have had the opportunity to have its credibility on purpose tested at a hearing before any finding of improper purpose. As a result, the Judge's findings as to improper purpose could not be justified.

[187] But the trespass claims were trivial and petty. We consider the proceedings frivolous and, to that extent, an abuse of process. Even if they had been commenced for a proper purpose, by the time of the application for summary judgment and strike out, there was no proper purpose in continuing with them. We agree with the Judge that, had summary judgment not been granted, the claim should nevertheless have been struck out.

Costs

[188] This brings us to the issue of costs. By the time of Mr LeRoy's application for costs in the High Court, Associate Judge Bell had retired and the decision was made by a different High Court Judge after reviewing the judgment and submissions.[93] Unsurprisingly, given the Associate Judge's findings, the High Court Judge awarded indemnity costs. SPAK appeals.

Indemnity or increased costs

[189] The party claiming indemnity costs bears the onus of persuading the court that the award is justified.[94] Rule 14.6(4) of the High Court Rules governs the awarding of indemnity costs:

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93 *SPAK (1996) Ltd v Leroy* [2021] NZHC 3278.

94 *Radfords Ltd v Advertising Works New Zealand Ltd* HC Auckland CIV-2006-404-325, 25 April 2006.

14.6 Increased costs and indemnity costs

…

(4) The court may order a party to pay indemnity costs if—

(a) the party has acted vexatiously, frivolously, improperly, or unnecessarily in commencing, continuing, or defending a proceeding or a step in a proceeding; or

…

[190] *Bradbury v Westpac Banking Corporation* is the leading case on indemnity costs.[95] This Court described increased costs as warranted where "there is failure by the paying party to act reasonably" and indemnity costs "where that party has behaved either badly or very unreasonably".[96] Specifically, this Court identified the following circumstances as ones where indemnity costs have been ordered:[97]

(a) the making of allegations of fraud knowing them to be false and the making of irrelevant allegations of fraud;

(b) particular misconduct that causes loss of time to the court and to other parties;

(c) commencing or continuing proceedings for some ulterior motive;

(d) doing so in wilful disregard of known facts or clearly established law;

(e) making allegations which ought never to have been made or unduly prolonging a case by groundless contentions, summarised in French J's "hopeless case" test.

[191] Increased costs can be awarded if, under r 14.6(3)(b):

(b) the party opposing costs has contributed unnecessarily to the time or expense of the proceeding or step in it by—

(i) failing to comply with these rules or with a direction of the court; or

(ii) taking or pursuing an unnecessary step or an argument that lacks merit; or

(iii) failing, without reasonable justification, to admit facts, evidence, documents, or accept a legal argument; or

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95 *Bradbury v Westpac Banking Corporation* [2009] NZCA 234, [2009] 3 NZLR 400; and *Ben Nevis Forestry v Commissioner of Inland Revenue and Redcliffe Forestry Venture Limited* [2014] NZCA 348, (2014) 22 PRNZ 322.

96 At [27].

97 At [29].

…

[192] As discussed, by the time of the hearing into the summary judgment/strike out applications, there was no purpose in continuing with the proceedings. They should have been discontinued. Given our observations in respect of the improper purpose finding, we do not consider that indemnity costs were appropriate, although our other findings suggest increased costs might well be. In the circumstances, we allow the appeal in respect of indemnity costs and remit the matter back to the High Court for costs on the summary judgment and strike out to be considered afresh. Mr LeRoy is to file his submissions within 21 days of the date of this judgment, with any reply required 14 days thereafter.

[193] In his written submissions on appeal, Mr Morrison sought costs (and disbursements) on this appeal and sought to deal with these issues separately. He did not, however, refer to costs at the hearing.

[194] We consider it appropriate that costs should lie where they fall. However, if the parties wish to file submissions as to costs, Mr LeRoy is to file any submissions within 21 days of the date of this judgment, with any reply required 14 days thereafter.

Result

[195] SPAK's application to adduce further evidence is declined. Mr LeRoy's application to adduce further evidence is granted.

[196] The appeal against summary judgment is dismissed. The appeal against the award of indemnity costs is allowed.

[197] Costs on the appeal to this Court are reserved. Costs in the High Court are remitted back for determination in that Court.

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